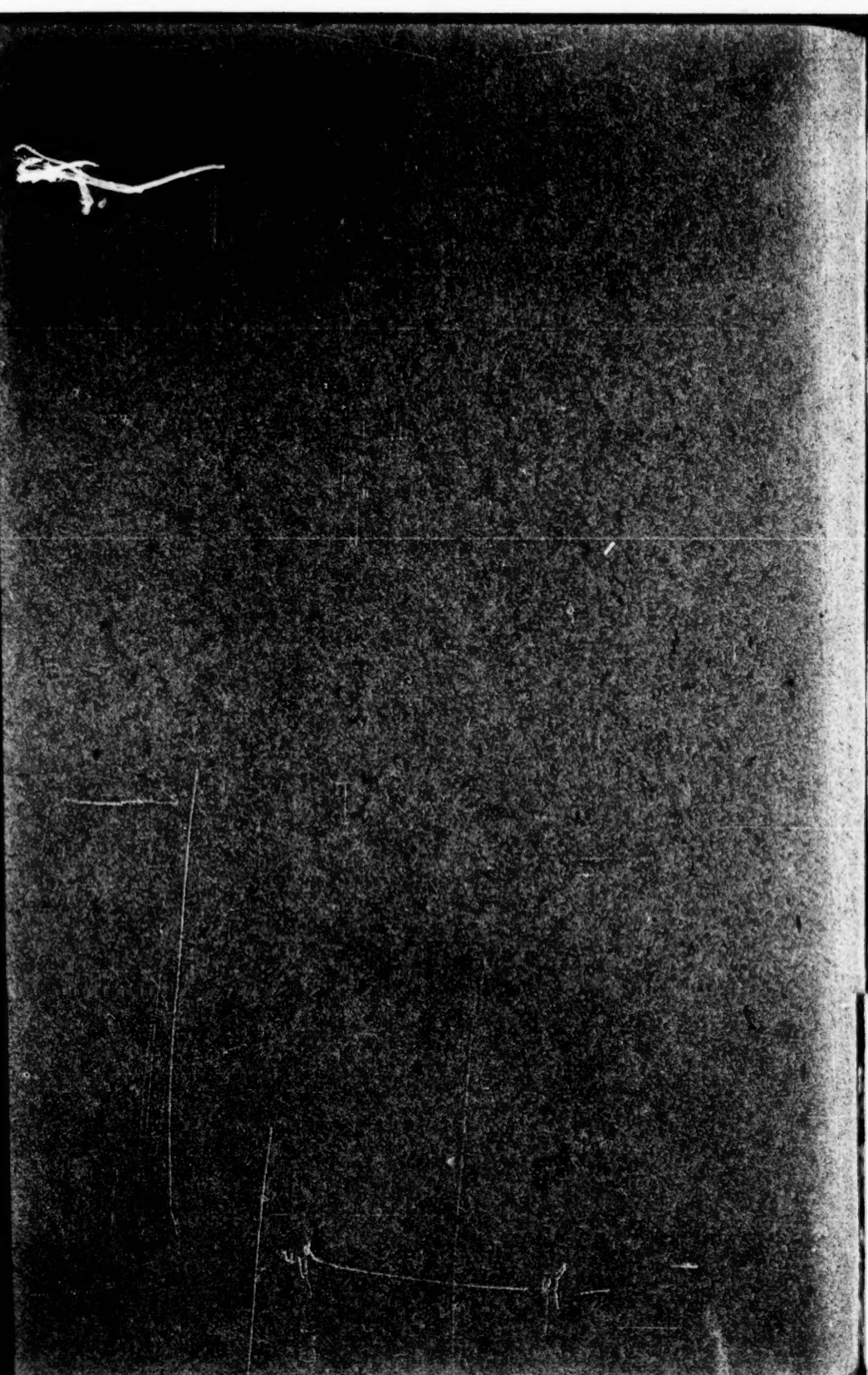

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. [redacted] 18

HUEY P. LONG,

Petitioner,

vs.

SAMUEL T. ANSELL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
ADRIEN F. BUSICK,
SETH W. RICHARDSON,
Attorneys for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 954

HUEY P. LONG,

Petitioner,

vs.

SAMUEL T. ANSELL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Said petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the District of Columbia, entered in the above entitled cause on February 5, 1934, affirming the decision of the Supreme Court of the District of Columbia, dated May 9, 1933 (R. 30).

Question Presented.

Whether a member of the Senate of the United States, who resides elsewhere than in the District of Columbia, may lawfully be, during the period when such Senate is in session subjected to service of summons in a civil action in the courts of said District.

Laws Involved.

Article 1, Section 6, Clause 1, of the Constitution of the United States.

General rules of law granting exemption from service of civil process to persons temporarily within the jurisdiction on matters of public duty or public business.

Statement and Summary.

The defendant is a Senator of the United States from the State of Louisiana, and a resident of that State. This action was brought by the plaintiff, alleging that the defendant had published a libel, contained in a speech made by defendant on the floor of the Senate on February 21, 1933. That the defendant had mailed copies of that part of the Congressional Record containing the speech to persons in Louisiana, District of Columbia and elsewhere. The fourth count of the declaration is based upon the distribution of a circular by the defendant in Louisiana, containing statements respecting the methods employed by the Senate Committee in its investigation of the election of John H. Overton to the United States Senate. The action alleges damages in the amount of Five Hundred Thousand Dollars ($500,000) (R. 1-18).

The declaration and summons was served upon the defendant on April 3, 1933, in the District of Columbia, where the defendant was then temporarily in attendance upon an extraordinary session of the Senate of the United States. This Court, will, of course, take judicial notice of the fact that the Senate of the United States was at that time in such session.

Defendant, thereafter, appeared specially and moved the court to quash the summons and service upon the ground that said defendant was exempt from such service of summons under the facts and circumstances set forth

above (R. 19). The trial court denied the motion to quash, and the Court of Appeals of the District of Columbia granted a special appeal, and the matters involved in such motion were duly submitted to that court.

The District Court of Appeals affirmed the order of the trial court, denying such motion to quash (R. 30), but, in addition thereto, departed from the accepted and usual course of judicial proceedings, by going outside of, and beyond the matter in issue, to assert various conclusions of law and fact having sole effect upon, and reference to, the merits of the litigation, and vitally prejudicing the ultimate rights of this defendant in such litigation. A timely motion for modification of opinion was filed (R. 31) which motion the Court of Appeals denied (R. 33).

Specification of Errors to be Urged.

The District Court of Appeals erred:

1. In affirming the decision of the trial court denying defendant's motion to quash.

2. In exceeding its jurisdiction under the record submitted, by passing upon the merits of the litigation and defendant's rights therein.

3. In denying defendant's motion to modify such opinion.

Reasons for Granting the Writ.

1. That the Court of Appeals of the District of Columbia has decided a question of general importance, relating to the construction and application of the Constitution of the United States, and to the laws and decisions of the United States, which has not been, but should be, settled by this Court.

2. That the Court of Appeals of the District of Columbia, has decided an important question of general law, probably untenable, and in conflict with the weight of authority.

3. That the Court of Appeals of the District of Columbia has so far departed from the accepted and usual course of judicial proceedings to defendant's prejudice, as to call for an exercise of this Court's power of supervision.

(a) The question of the exemption of a member of Congress, is, we submit, a question of general importance arising under the constitution and laws of the land, which this Court should finally settle. The following decisions—which are not referred to in the decision of the Court of Appeals—are, we think, in conflict with such opinion.

Miner v. *Markham*, 28 Fed. 387 (Wisc.).
Bolton v. *Martin*, 1 Dall. 296 (Pa.).
Geyer's Lessee v. *Irwin*, 4 Dall. 107 (Pa.).
Gray v. *Sill*, 13 W. N. C. 59 (Pa.).
Ross v. *Brown*, 7 Pa. Co. Ct. 142 (Pa.).
Nones v. *Edsall*, 1 Wall. Jr.189, Fed. Cas. 10290.
Doty v. *Strong*, 1 Pinney 84 (Wisc.).
Anderson v. *Roundtree*, 1 Pinney 115 (Wisc.).
Robbins v. *Lincoln*, 27 Fed. 342.
Welsh v. *Mooney*, 33 Ohio Cir. Ct. 214.
Filer v. *McCormick*, 260 Fed. 309 (Cal.)

A conflict therefore arises which should be finally settled.

(b) The department by the Court of Appeals from the accepted and usual course of judicial proceeding here complained of by petitioner, consists of the act of that court in its opinion (R. 24), in assuming to pass upon and decide the merits of the litigation, under a record which submitted only the question of exemption from service of process, with no reference to the merits. Reference is had to the pertinent excerpts of the opinion as identified in the motion to modify (R. 31).

Petitioner is aware that the review below was upon a motion to quash, made under special appearance. No final

judgment, on the merits, therefore has yet been had. The power of this Court, however, under Section 240 (a) of the Judicial Code, to review on certiorari, is not confined to final judgments.

American Co. v. *R. R. Co.*, 148 U. S. 372.
Spiller v. *R. R.*, 253 U. S. 117.
U. S. v. *Three Friends*, 116 U. S. 1.
Fuller Co. v. *Otis Co.*, 245 U. S. 489.

The fact therefore that the question involved is one of great importance, hitherto undecided by this Court, and that the Court of Appeals granted a special appeal in order to pass upon it, and that the motion to quash, if sound, will terminate the case, and greatly conserve time, trouble, and expense consequent upon trial, persuades petitioner that the Court ought to issue the pertinent writ, and settle this disputed question, without awaiting a final judgment on the merits.

Moreover, unless the opinion below is modified and corrected, any trial hereafter to be had, will be seriously affected, impeded and prejudiced by the improper statements included in the opinion of the court below.

These propositions will have detailed consideration in a following supporting brief:

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted, in manner and form as may be just, necessary and proper.

JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
ADRIEN F. BUSICK,
SETH W. RICHARDSON,
Attorneys for Petitioner,
Washington, D. C.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinions of the courts below are not reported. The opinion of the District Court of Appeals appears at page 24 of the record.

Jurisdiction.

The judgment of the District Court of Appeals was entered February 5, 1934. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether a member of the Senate of the United States, who resides elsewhere than in the District of Columbia, may lawfully be, during the period when such Senate is in session, subjected to service of summons in a civil action in the courts of said District.

Laws Involved.

Article 1, Section 6, Clause 1, of the Constitution of the United States.

General rules of law granting exemption from service of civil process to persons temporarily within the jurisdiction, on matters of public duty or public business.

Summary of Law.

At common law in England until changed by statute, members of Parliament were exempt from service of civil process. Following the adoption of our Constitution, the courts quite generally held that legislators were so exempt, construing the word "arrest" in the constitutional pro-

vision, broadly, to include service of civil process, while Congress was in session.

Under general rules of law, where a person comes into a jurisdiction as a suitor or a witness, either voluntarily or involuntarily, he is exempt from service of process. This rule has now been extended to persons engaged in public or governmental business. Members of Congress should thus be within this exemption, during sessions of the Congress.

The court below, in its opinion, went outside the record and determined the merits of the litigation itself, to the great prejudice of petitioner in any future proceedings in the case.

Specification of Errors to be Urged.

The District Court of Appeals erred:

1. In affirming the decision of the trial court denying defendant's motion to quash.

2. In exceeding its jurisdiction under the record submitted, by passing upon the merits of the litigation and defendant's rights therein.

3. In denying defendant's motion to modify such opinion.

ARGUMENT.

I.

It is the contention of the Appellant that a Senator of the United States, present in the District of Columbia in attendance upon an existing session of Congress, is exempt from service of process while so present in said District.

In considering this question, we desire to present the matter in the following aspects:

(1) At common Law;

(2) Under the provisions of Article 1, Section 6, Clause 1 of the Federal Constitution;

(3) Under the general rules of law in force in the United States concerning such exemptions.

II.

At Common Law.

Much controversy exists as to the precise privilege extended to members of Parliament at common law, and it seems difficult, if not impossible, to harmonize the available expressions of the English courts on the subject.

In 1841, however, the entire subject was reviewed in the case of *Cassidy* v. *Stewart,* 2 Manning and Granger 437. The decision in this case, in which the full bench participated, points out in detail, that, originally, at common law, no process of any kind could issue against a member of Parliament, but that the rule had been changed by statute through the enactment of 12 and 13 W 3, c. 3 and 10 G 3, c. 50, which statutes permitted certain service of process on members of Parliament.

The reason why these statutes were passed is apparent, as the English courts, differing from American courts, possess jurisdiction throughout England, and any suit thus brought against a member of Parliament might, by the court, be assigned for trial and disposition properly in the county of residence of the particular defendant. Consequently, the fact that the defendant might be in attendance upon Parliament became much less important.

State v. *District Court,* 243 Pac. 123 (Wyo.).

Argument—*Bolton* v. *Martin* (*infra*).

It seems clear, however, that, prior to these statutes, privilege from arrest, in England, embraced privilege from service of civil process.

In view of the statutory enactments, therefore, and the inherent difference in jurisdictional conditions, the former

and present status of the claimed privilege in England affords little aid in the determination of the question here submitted.

It would seem, however, that, in framing the constitutional provision, the framers must have had in mind the broad meaning of the word "arrest," which, exclusive of statute, had previously prevailed in England, because, as we shall see, the early cases in the United States all followed this broad interpretation of the word "arrest."

III.

Constitutional Provisions.

Clause 1 of Article 1, Section 6 of the Constitution provides:

> "* * * they (members of Congress) shall in all cases, except treason, felony and breach of peace, be privileged from arrest during their attendance at the sessions of their respective Houses, and in going to and returning from the same."

Similar language is found in practically each of the Constitutions of the several states, and has been the subject of a diversity of interpretations.

Cases may be found holding that the word "arrest" refers to the well-known arrest in criminal cases. Other cases hold that the word "arrest" should be confined to those instances of physical arrest in civil cases. It has further been held, as above stated, and as we contend here, that the word "arrest" is one of general significance which must be given a general meaning.

So far as the Federal courts are concerned, it has been settled by this Court that the privilege referred to in the constitutional provisions applies only to civil cases, and does not apply in any criminal proceeding. *Williamson* v. *United States*, 207 U. S. 425.

Consequently, the only question remaining is whether the word "arrest" refers only to those few remaining instances of civil arrest where actual detention of the person exists, or, more broadly contrued, applies to the service of civil process upon the member of Congress, as originally existed in England, and as held in the early cases on the point, immediately following the adoption of the Constitution.

It is, of course, freely conceded that the authorities are not now in accord upon this question. The decisions opposed are collected in the opinion below.

IV.

Applicable Decisions.

In the case of *Miner* v. *Markham*, 28 Fed. 387, the precise point here involved was presented with respect to service of process on a member of Congress, en route to the District of Columbia. The court held the constitutional provision exempted a member of Congress from service of process while going to the seat of government at Washington. A *fortiori*, we suggest, the same rule would apply if the member had actually reached Washington, and was engaged in his official duties, as was the defendant, here.

In *Bolton* v. *Martin*, 1 Dall. 296 (Pa.), it was held that a member of the State convention called to consider the ratification of the Constitution of the United States, was privileged from the service of summons or arrest during the session, and for a reasonable time before and after it.

Criticism is offered of this decision upon the allegation that the decision was based on an erroneous quotation from Blackstone. An examination of the well considered opinion plainly discloses that the court did not base its opinion upon the quotation from Blackstone, but merely referred to that quotation in general support of the con-

clusions reached. The decision is specifically in point and well reasoned.

In *Geyer's Lessee* v. *Irwin*, 4 Dall. 107, decided by Supreme Court of Pennsylvania in 1790, it was held that "a member of the general assembly is undoubtedly privileged from arrest, summons, citation, or other civil process during his attendance on the public business confided to him." Undoubtedly the decision was "dictum" but its reasoning is cogent.

Moreover, the rule announced, was approved and followed in *Gray* v. *Sill*, 13 W. N. C. 59, and *Ross* v. *Brown*, 7 Pa. Co. Ct. 142.

In *Nones* v. *Edsall*, 1 Wall. Jr. 189, Fed. Cas. 10,290, the court, while referring to the opinion in *Geyer's* case as dictum, states:

> "Members of Congress are privileged from arrest both on judicial and mesne process, and from the service of summons or other civil process while in attendance on their public duties."

The court, however, held that this privilege did not apply to a case already pending, which was not commenced by service on the member while in attendance on Congress.

The Supreme Court of the Territory of Wisconsin, in *Doty* v. *Strong*, 1 Pinney 84, likewise passed upon the precise question as affecting the territorial delegate in Congress. The court said:

> "In order to render this provision available to the extent of its necessity, it will not do to construe the words 'privilege from arrest' in a confined or literal sense. A liberal construction must be given to these words upon principle and reason. It is just as necessary for the protection of the rights of the people that their representative should be relieved from absenting himself from his public duties during the session

> of Congress, for the purpose of defending his private suits in court, as to be exempt from imprisonment on execution."

This opinion is criticized because the court cited only the *Geyer* case. The court's reasoning, however, remains entirely applicable.

Furthermore, the Wisconsin court in *Anderson* v. *Roundtree,* 1 Pinney 115, the following year, reaffirmed the conclusion reached in the *Doty* case.

See also:

> *Robbins* v. *Lincoln,* 27 Fed. 342;
> *Welsh* v. *Mooney,* 33 Ohio Cir. Ct. 214.

The same conclusion is reached in an extensive note found in 76 Am. St. Rep. 534.

It is submitted that the foregoing decisions clearly support the rule that freedom from arrest, includes freedom from service of civil process. It is not controverted that decisions may be cited opposing this contention. It is believed, however, that the status of most of the opposing decisions present various characteristic differences which should have careful consideration. Such cases involve either the privilege of suitors or witnesses and not those of public servants (*U. S.* v. *Cooper,* 4 Dall. 341). The privilege is demanded by residents of the jurisdiction and not by non-residents (*Case* v. *Rorabacker,* 15 Mich. 537). Frequently, the matter considered by the court involved a question of a waiver of the privilege instead of the existence or non-existence of the privilege, itself (*Peters* v. *League,* 13 Md. 58). Some of the cases involved the question of the service of a witness subpœna, and did not purport to involve the persons served in litigation (*Respublica* v. *Duane,* 4 Yeates 347). The case of *People* v. *Hofstadtor,* 258 N. Y. 425 (opinion by Cardozo, J.) had to do with a witness before a legislative committee, and did not

involve any suit, as the opinion points out. Still other cases dispose of the privilege as though it were to be considered only as a claim of personal benefit, wholly overlooking the public interest really at stake (*Phillips* v. *Browne,* 270 Ill. 450). The foregoing are some of the differences which we suggest will be found in most of the cases cited in opposition to the rule for which we here contend.

The Exemption from Service of Process Under General Law.

In considering the claimed right of a member of Congress to be privileged from the service of civil process while in attendance upon his duties at the seat of Government at Washington under the constitutional provision, it must be clearly appreciated that the existence of similar privileges, under general law and practices, with respect to the service of process, is not only not unusual, but is a frequent condition, viewed with favor, and always given a broad construction. Thus, the rule is practically universal that a non-resident of the jurisdiction, who is present in the jurisdiction either as a *suitor* or a *witness,* may not be lawfully served with process while thus present within the jurisdiction. This privilege is not dependent upon either constitutional or statutory enactment, but has grown up out of public policy, not as a favor to the privileged person, but as an inherent right on the part of the public interests.

> "Such privilege was not peculiar to the common law of England, nor did it exist only through constitutional or legislative enactments. It is inseparably connected with that fundamental maxim in free governments, that where exigency renders it necessary for the common preservation, the private right shall yield to public good."
>
> (Note: 16 Am. Dec. 782.)

Thus this Court in the case of *Stewart* v. *Ramsden*, 242 U. S. 128, establishes the universality of the rule, and points out that the privilege claimed is the privilege of the court "rather than of the defendant."

See also:

Wheeler v. *Flintoff*, 159 S. E. 112 (Va.).
Arnett v. *Smith*, 145 So. 638 (Miss.).
Zimmerman v. Buffington, 238 N. W. 115 (Neb.).
State v. *District Court*, 243 Pac. 123 (Wyo.).
Murrey v. *Murrey*, 16 Pac. (2nd) 741 (Calif.).
Higgins v. California Growers, 288 Fed. 550 (C. C. A. 2d).

Nor has this privilege, thus firmly established, been confined to suitors and witnesses. The rule is stated as follows:

> "In recent years, the privilege has, in some instances, as a matter of public policy, been extended to all non-residents within a jurisdiction, engaged in the performance of a public duty at least during the time of the emergency." (50 C. J. 246.)

Thus the privilege has been extended to national bank officials while attending conferences in other States upon the request of the Governor of a Federal Reserve Bank.

Filer v. *McCormick*, 260 Fed. 309 (Cal.).

We invite the attention of the Court to the decision in the *Filer* case which states:

> "It would be a singularly inconsistent public policy that dictated the protection of such a class (non-Resident Witnesses) and denied it to those engaged in serving solely the public good. * * * It is at least doubtful if those citizens would have given the same ready response to the dictates of their patriotic sense

> of duty had they been advised that the law was powerless to afford them protection against liability to harassing litigation to which they might be subjected by private suitors in strange and remote jurisdictions." (Cited with approval in *Murrey* v. *Murrey,* 16 Pac. (2nd) 741 (Cal.).

In the light, therefore, of such extension of privilege from service of process to suitors, witnesses and public servants, it is not surprising to find that some of the States have extended like privileges to members of the State Legislatures while such Legislatures are in session. (59 *Corpus Juris* 87 (54), and cases.)

We, therefore, find from the foregoing authorities, that the fullest privilege from service of process is extended to the various classes of persons heretofore detailed. These privileges are said to be the result of a controlling public policy, and are not based upon statutes and constitutional provisions. Such privilege is not viewed as belonging to the individual, but is looked upon as the exercise of a public right, governmental and judicial in its nature. The allowance of such privileges, these authorities state, has been more and more freely extended during recent years, until today it may be fairly stated that any person who comes, or is brought, into a foreign jurisdiction of which he is not a resident, on a judicial or public errand, is privileged from the service of civil process while within such foreign jurisdiction.

It seems perfectly apparent that every reason adduced for the establishment of these privileges just discussed, applies to a member of Congress, with peculiar force and pertinency. The public nature of the service, its importance to the individual State, and its presumed supreme necessity to the Government, all create a condition of national importance which much surpasses the needs upon

which privileges have been extended to other classes of persons. It is the height of absurdity to establish that a banker who enters a foreign State upon the request of Federal banking officials is immune from service of process while in that State, and a United States Senator, in such times as these, proceeding from the State of his domicile to attend an extraordinary session of Congress at the Capitol in the District of Columbia, might do so only subject to the menace of being harassed by private litigation in the District of Columbia.

The cases which we have cited above by analogy require the granting of such privilege to a member of Congress.

The establishment of such a rule creates no injustice. Even if it did, it would be subject to the rule that private interests must yield to the protection of the public interests. But no injustice exists. As the Federal court said in the *Filer* case (*supra*):

> "This conclusion is reached with less reluctance in that, while avoiding great inconvenience and harassment to the defendant, it works no great hardship on the plaintiff, no essential right being lost to him. The cause of action may readily be reasserted in the jurisdiction originally resorted to, as to which no such question can arise, and where his rights may be as fully and completely adjudicated and protected as in this."

The defendant is only present in the District of Columbia as a member of Congress in attendance upon his official duties. His home, domicile and residence is in the State of Louisiana, where he abides. Courts of Louisiana stand open to the plaintiff to litigate any cause of action which he may have, and the courts ought not to deny to the defendant, as a member of Congress, either under the constitutional provision, or under the principles of general law, the privilege which it so freely extends to litigants,

witnesses, and even to individuals, on errands connected with the public interest.

VI.

Modification of Opinion Below.

Our third reason for praying the issuance of a writ, is due to the error committed by the court below, in departing from the accepted and usual course of judicial proceedings, to defendant's prejudice.

The petitioner, appearing specially, submitted a motion to quash the service of summons, because of his claimed exemption (R. 19).

The court denied the motion. An appeal followed, solely involving the soundness of the motion to quash. No other point was involved, presented, or argued.

On deciding the issue, however, the court below said (R. 25):

> "It is sufficient to say that if the allegations of the petition are supported by sufficient evidence, the matter charged constitutes libel *per se*."

Whether the matter charged constituted libel *per se*, was not before the court. The time to so decide would be when, as, and if, the case should be thereafter tried on the merits.

Then the court continued (R. 30):

> "Defendant pitches his defense upon the exemption from arrest, and not upon his exemption from responsibility for statements made in his speech on the floor of the Senate, but were that claim advanced it would be without force since the acts charged have only remote connection with the speech. While the published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate, but in the publication and circularizing of the libelous documents."

In this language the court decides at least two vital issues, certain to arise upon a trial, to wit:

(1) That the acts charged, that is, the dissemination of the speech, by Congressional frank, were not within the constitutional immunity protecting the speech.

(2) That the publication and circularization of the reports of the speech, is, first, an offense, and second, a different offense than the uttering of the speech on the floor of the Senate. Such questions are vital to the future presentation of petitioner's defense, if a trial shall be had. No court has ever decided these questions. They are new, and exceedingly important in these days of the extension of the Congressional franking privilege.

Yet, if the opinion below stands, petitioner must, if he shall fail in his claim of exemption from service of process, herein submitted, proceed to trial before judges who will be fairly bound to follow what the Court of Appeals has improperly announced as the law, and the Court of Appeals itself, in the event of a future appeal, will be embarrassed by this premature statement of what its own final opinion should be.

We asked the court below to strike out the objectionable matter (R. 31). The court refused, thus intensifying the injury to petitioner. We submit, therefore, that our petition to the Court for a writ of certiorari, under our third reason for granting the writ, is the only way in which the lawful rights of petitioner may be properly protected.

JOSEPH E. DAVIES,
RAYMOND N. BEEBE,
ADRIEN F. BUSICK,
SETH W. RICHARDSON,
Attys. for Petitioner,
Washington, D. C.